



# Commonwealth of Massachusetts State Ethics Commission

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Jennie Caissie  
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## **PUBLIC ENFORCEMENT LETTER 99-3**

Dear Ms. Caissie:

As you know, the State Ethics Commission ("the Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, General Laws c. 268A, by participating as an Oxford Board of Selectman ("BOS") member in a decision to issue an outdoor business permit to Gary Kettle ("Kettle") for a fruit stand while your family operated a competing outdoor fruit stand. Based on the staff's inquiry (discussed below), the Commission voted on January 13, 1999, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §§19 and 23(b)(3).

For the reasons discussed below, the Commission does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the public's attention, the facts revealed by the preliminary inquiry and by explaining the application of the law to the facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

### **I. Facts**

1. Oxford covers 26.71 square miles with 81 miles of public roads. Oxford's population is 13,298.
2. You serve as an Oxford selectman, having been elected in May 1997.
3. Your immediate family<sup>1/</sup> has owned and operated a fruit and vegetable stand at 233 Main Street in Oxford since 1995. Your family's business permit allows the stand to operate from July to December. Goods are sold off a truck and trailer parked at 233 Main Street.
4. On August 12, 1997, Kettle appeared before the BOS requesting an outdoor business permit to operate a fruit and vegetable stand on Charlton Street in Oxford. Kettle has not previously operated such a stand in Oxford. Kettle wanted to build a wooden fruit stand 20 feet by 24 feet, with a parking area of 300 feet by 50 feet. Kettle's business permit application states that his stand would operate from April to December. It would be approximately 2 ½ miles from your family's fruit stand.

5. According to the BOS minutes, you were significantly involved in the discussion concerning Kettle's application for this permit.<sup>2/</sup>

6. The BOS approved Kettle's permit application. The vote was 3-0 with you abstaining and one BOS member absent.

7. You sent the following letter dated October 17, 1997, to the State Ethics Commission:

An issue came before the Board of Selectmen regarding whether to issue Mr. Kettle a permit to build a fruitstand at a location in close proximity to a major river in Oxford. The Board of Selectmen voted to issue Mr. Kettle the permit. In lieu (sic) of the fact that I hold a fruitstand permit in Oxford and sell vegetables in the community, I did not vote on the issue when it came before the Board of Selectmen, as I believed it to be improper for me to take action on the matter.<sup>3/</sup>

## **II. Discussion**

As a selectman, you are a municipal employee subject to the conflict of interest law, G.L. c. 268A.<sup>4/</sup> You are subject to c. 268A generally and, in particular, to §19<sup>5/</sup> which prohibits a municipal employee from participating<sup>6/</sup> in particular matters<sup>7/</sup> in which she or a member of her immediate family<sup>8/</sup> has a financial interest.<sup>9/</sup> The concern of this section is that the objectivity and integrity of municipal employees can be compromised if they act on matters affecting the financial interests of people or businesses with whom they are closely related. The Massachusetts Supreme Judicial Court has determined that participation involves more than just voting, and includes any significant involvement in a discussion leading up to a vote. See *Graham v. McGrail*, 370 Mass. 133, 138 (1976). In that case, the Court advised, "The wise course for one who is disqualified from all participation is to leave the room." *Id.*

Your family's fruit stand business and Kettle's proposed fruit stand would be competitors. Both are in the same business (selling fruits and vegetables) and operate in a small town. The stands are 2 ½ miles away from each other and operate basically at the same times during the year. Furthermore, in your above-described October 17, 1997 letter, you in effect concede that it would have been improper for you to vote on Kettle's permit because you would be competitors.

The decision to approve Kettle's application for a permit to operate a fruit and vegetable stand was a particular matter. Because Kettle's proposed business, if approved, would compete with your family's fruit stand, you and/or your immediate family had a financial interest in this decision. You were aware of that financial interest. Your involvement in this decision was substantial because you contributed significantly to the discussion leading up to the vote. Therefore, by participating in the discussion concerning Kettle's application for an outdoor permit to operate a fruit and vegetable stand, there is reasonable cause that you violated §19.

In the future, to avoid violating §19, you should completely abstain from any involvement in a particular matter in which your family's business has a financial interest (either directly, or indirectly through actions affecting a competitor) and you should consider leaving the room if a group discussion is involved, as the Court advised in *Graham v. McGrail*, *supra*.<sup>10/</sup>

### **III. Disposition**

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to \$2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter rather than imposing a fine because it believes the public interest would best be served by doing so.

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.

This matter is now closed.

**DATE: February 25, 1999**

1/ Your family has owned and operated the fruit stand for a number of years. The permit has either been in your and/or your father's name.

2/ Examples of your involvement are:

"Selectman Caissie asked how close the fruit stand was to the river."

"Selectman Caissie asked if this [the fruit stand being only 16 feet from the river bank] was a pollution issue."

"Selectman Caissie said that she had a concern about people pulling out around that corner on Charlton Street."

"Chairman Saad said that he would entertain a Motion to grant the Outdoor Business Permit. Selectman Caissie asked that the Board's vote be contingent upon the Conservation Commission's decision."

3/ There are four fruit stand permits in Oxford (this number includes your and Kettle's businesses).

4/ A copy of G.L. c. 268A is attached for your information.

5/ Section 19 provides in pertinent part,

(a) Except as permitted by paragraph (b), a municipal employee who participates as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.

6/ "Participate" means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

7/ "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

8/ "Immediate family" means the employee and his spouse, and their parents, children, brothers and sisters.

9/ "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. See *EC-COI-84-96*.

10/ Your actions also raise concerns under §23. Section 23 is the so called "code of conduct" section of the conflict of interest. The subpart of that section which appears to apply to your situation is §23(b)(3). Section 23(b)(3) prohibits a municipal employee from knowingly, or with reason to know, acting in a manner which would cause a reasonable person, with knowledge of the relevant facts, to conclude that anyone can improperly influence or unduly enjoy her favor in the performance of official duties, or that she is likely to act or fail to act as a result of kinship, rank, position or undue influence. This subsection's purpose is to deal with appearances of impropriety and, in particular, appearances that public officials have given people preferential treatment. This subsection goes on to provide that the appearance of impropriety can be avoided if the public employee discloses in writing to her appointing authority (or if she does not have an appointing authority, discloses in a manner which is public in nature (such as filing a written disclosure with the town clerk)) all of the relevant circumstances which would otherwise create the appearance of conflict. The appointing authority or town clerk (for elected employees) must maintain that written disclosure as a public record.

Even if for some reason you and/or your immediate family did not have a financial interest in the Kettle permit particular matter which triggered a §19 problem, there would still be reasonable cause to believe that you violated §23(b)(3). That is, by participating in matters affecting a competitor's permit application, you acted in a manner which would cause a reasonable person to conclude that you might be unduly influenced by your family's business interests in the performance of your official selectman duties. Your having a competitor relationship with Kettle would give you a bias as to Kettle's application. It would not matter whether, in fact, you acted on or were affected by that bias. The mere fact that a reasonable person could conclude that you had the bias would be enough to create an appearance problem under §23(b)(3). Consequently, if there had not been a §19 bar to your participating, as discussed above, you still should not have participated under §23(b)(3) unless you first made a written §23(b)(3) disclosure. Again, on the present facts, §19 would appear to have applied for the reasons discussed above.

